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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MICHAEL K. DEAVER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the denial of a pretrial motion to dismiss an indictment on substantial separation-of-powers grounds challenging the prosecutor's very right to proceed against petitioner is, as three other circuit courts of appeals have held, interlocutorily appealable under the collateral order doctrine?

2. Whether the provisions of the Ethics in Government Act of 1978 creating an Office of Independent Counsel to enforce federal criminal law to the exclusion of the Executive Branch against certain classes of individuals are an unconstitutional violation of the principle of separation-of-powers?

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OPINIONS BELOW

The decision of the court of appeals below (Pet. App. A., pp. 1a-4a, infra) is unreported, as is the prior opinion of

that court upon which the panel below relied. (Pet. App. B, pp. 5a-38a, infra). The pretrial orders of the district court denying petitioner's motion to dismiss the indictment (Pet. App. C, pp. 39a-41a, infra), and his motion for reconsideration of that denial (Pet. App. D, pp. 42a-43a infra), are also unreported. A prior opinion of the district court in a related civil case (Pet. App. E, pp. 44a-54a, infra) which the district court relied on in denying petitioner's motion to dismiss, is reported at 656 F. Supp. 900 (D.D.C. 1987).

JURISDICTION

The opinion of the court of appeals was entered on June 15, 1987. (Pet. App. A., p. 2a, infra). The jurisdiction of this Court rests upon 28 U.S.C. § 1254 (1) (1976).

STATUTORY PROVISIONS INVOLVED

The Ethics in Government Act ("EIGA"), Pub. L. No. 95-521, 92 Stat. 1824, provides, in pertinent part (28 U.S.C. §§ 591(a), 592(c)(1), 594(a), 594(d), 595(d), 596(a)(1)-(3), 596(b)(2), & 597(a)):

> (a) The Attorney General shall conduct an investigation pursuant to the provisions of this chapter whenever the Attorney General receives information sufficient to constitute grounds to investigate that any of the persons described in subsection (b) of this section has committed a violation of any Federal criminal law other than a violation constituting a Class B misdemeanor or an infraction.
>
> * * *
>
> (c)(1) If the Attorney General, upon completion of the preliminary investigation, finds reasonable grounds to believe that further investigation or prosecution is warranted, or if ninety days elapse from the receipt of the information without a determination by the Attorney General that there are no reasonable grounds to believe that further investigation or prosecution is warranted, then the Attorney General

shall apply to the division of the court for the appointment of a independent counsel.

* * *

(a) Notwithstanding any other provision of law, a independent counsel appointed under this chapter shall have, with respect to all matters in such independent counsel's prosecutorial jurisdiction established under this chapter, full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except that the Attorney General shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under section 2516 of title 18.

* * *

(d) A independent counsel may request assistance from the Department of Justice, and the Department of Justice shall provide that assistance, which may include access to any records, files, or other materials relevant to matters within such independent counsel's prosecutorial jurisdiction, and the use of the resources and personnel necessary to perform such independent counsel's duties.

* * *

(d) The appropriate committees of the Congress shall have oversight jurisdiction with respect to the official conduct of any independent counsel appointed under this chapter, and such independent counsel shall have the duty to cooperate with the exercise of such oversight jurisdiction.

* * *

(a)(1) A independent counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties.

(2) If a independent counsel is removed from office, the Attorney General shall promptly submit to the division of the court and the Committees on the Judiciary of the Senate and the House of Representatives a report specifying the facts found and the ultimate grounds for such removal.

(3) A independent counsel so removed may obtain judicial review of the removal in a civil action commenced before the division of the court and, if such removal was based on error of law or fact, may obtain reinstatement or other appropriate relief.

* * *

(2) The division of the court, either on its own motion or upon suggestion of the Attorney General, may terminate an office of independent counsel at any time, on the ground that the investigation of all matters within the prosecutorial jurisdiction of the independent counsel or accepted by such independent counsel under section 594(e) of this title, and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions.

* * *

(a) Whenever a matter is in the prosecutorial jurisdiction of an independent counsel or has been accepted by an independent counsel under section 594(e) of this title, the Department of Justice, the Attorney General, and all other ~~officers~~ and employees of the Department of Justice shall suspend all investigations and proceedings regarding such matter, except to the extent required by section 594(d) of this title, and except insofar as such independent counsel agrees in writing that such investigation or proceedings may be continued by the Department of Justice.

STATEMENT

This is the first case in which any individual has been indicted by an independent counsel enforcing federal criminal law under the procedures prescribed in the EIGA. Petitioner Michael K. Deaver ("Deaver") was a member of the Executive Branch, as Assistant and Deputy Chief of Staff to President Ronald Reagan, from January 1980 through May of 1985. Upon leaving the White House, Deaver opened a consulting business in Washington, D.C. which became fairly successful in a short period of time leading to allegations that Deaver must have been trading on his former position of influence in violation of federal conflict-of-interest laws. See, e.g., 18 U.S.C. § 207. In May of 1986, one year after he began his business, an independent counsel was appointed to investigate Deaver's activities in this

regard. An exhaustive investigation by the independent counsel failed to produce any charges of conflict-of-interest violations by Deaver. Instead, the independent counsel indicted Deaver on five counts of perjury based on voluntary testimony he had given concerning his business activities. Deaver presently stands charged with these offenses in the district court; no trial date is set. We recount briefly below the facts surrounding the statute at issue, its application to petitioner, and petitioner's unsuccessful efforts to have the statute declared unconstitutional and to appeal that adverse decision.

1. The Independent Counsel Statute

The ultimate issue underlying this petition is the constitutionality of those provisions of the Ethics in Government Act that authorize the appointment of "independent counsel" to investigate and

prosecute crimes committed by certain high-ranking executive officials and former officials. See 28 U.S.C. §§ 49, 591-598. As a brief overview of the statutory scheme will demonstrate, the purpose and effect of these provisions is to divest the Executive Branch of a significant portion of its law enforcement powers with respect to the officials covered by the statute.

Under the statute, the Attorney General is required to conduct a preliminary investigation whenever he becomes aware of grounds to investigate whether any person covered by the statute has committed a criminal offense. 28 U.S.C. §§ 591, 592. If this preliminary investigation reveals reasonable grounds to believe that further investigation or prosecution is warranted, or if after 90 days the preliminary investigation has not revealed that further investigation is not

warranted, the Attorney General must submit an application for the appointment of independent counsel to a "Special Division" of the United States Court of Appeals for the District of Columbia Circuit created by 28 U.S.C. § 49. 28 U.S.C. §§ 592(b)-(c).

Upon receiving such an application from the Attorney General, the Special Division, which is composed of three federal judges or justices designated by the Chief Justice of the United States, must appoint an independent counsel and define his investigative and prosecutorial jurisdiction. 28 U.S.C. § 593(b). Neither the President nor the Attorney General has any role in the actual appointment. The Special Division is free to appoint anyone it chooses as independent counsel, provided only that the appointee must not hold or recently have held an office of the United States

government. 28 U.S.C. § 593(d).

Once appointed, the independent counsel is supreme in the sphere of his jurisdiction. He acquires the full power of the Department of Justice to investigate and prosecute crimes within his jurisdiction; simultaneously, the Attorney General and the Department of Justice are stripped of all such power. 28 U.S.C. §§ 594, 597. In the exercise of his powers, the independent counsel is not subject to the supervision of any other Executive Branch officer, including the President. He must, however, periodically report to the Congress and to the Special Division, and he is required to "cooperate" with congressional oversight. 28 U.S.C. § 595. He may be removed by the Attorney General only for good cause or disability, and any removal attempted by the Attorney General is subject to de novo review by the Special

Division. 28 U.S.C. § 596(a). The Special Division, by contrast, itself possesses unreviewable discretion to terminate an independent counsel's office whenever it deems that step justified. 28 U.S.C. § 596(b)(2).

2. Application of the Statute To Petitioner

As a former Assistant and Deputy Chief of Staff to President Ronald Reagan, Deaver is within the class of persons covered by the independent counsel statute. 28 U.S.C. § 591(b). In the spring of 1986, the Justice Department received allegations suggesting that Deaver might have violated 18 U.S.C. § 207 in the conduct of the consulting business he established after leaving the White House. As required by the independent counsel statute, the Deputy Attorney General conducted a preliminary investigation into these charges and found that further investigation was warranted

as to three specific allegations regarding Deaver's postgovernment activities. [1]

On May 22, 1986, the Deputy Attorney General referred these three allegations to the Special Division for the appointment of an independent counsel, and recommended that the court define its appointee's investigative and prosecutorial jurisdiction to include the three referrals and any other related matters developed in the course of the investigation. On May 29, 1986, the Special Division responded by issuing an order appointing Whitney North Seymour, Jr. as independent counsel to investigate

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[1] Those three allegations were that Deaver had violated 18 U.S.C. § 207(c) when he allegedly communicated with National Security Adviser Robert C. McFarlane regarding a proposed amendment to the tax code, and had violated 18 U.S.C. § § 207(a) & 207(b)(ii) when he allegedly met with Special Envoy Drew Lewis in connection with the acid rain controversy between the United States and Canada.

and (if necessary) prosecute Deaver. As recommended by the Deputy Attorney General, the court's order defined the independent counsel's jurisdiction to include the three specific allegations mentioned in the Deputy Attorney General's application as well as any "related matters" arising out of the investigation of those allegations. In re Michael K. Deaver, Division No. 86-2, Order Appointing Independent Counsel (D.C. Cir. May 29, 1986).

The independent counsel promptly put together a staff of nine other attorneys [2] and initiated a broad grand

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[2] Upon his appointment of seven of these attorneys, the independent counsel sought and obtained from the Special Division "orders" purporting to "designat[e] and classif[y]" them "as Special Government Employees of the Office of Independent Counsel as a separate special agency for the limited purposes described in the Court's Order of May 29, 1986, . . . (cont'd.)

jury investigation of Deaver's post-governmental business activities. The independent counsel's grand jury heard testimony from over 100 witnesses (of whom Deaver was the first) and delved not only into the specific contacts with government officials that formed the basis of the three allegations referred to the Special Division by the Deputy Attorney General, but also into virtually all other government contacts initiated by Deaver, his associates, and his employees on

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[who] are not to be considered employees of, or subject to the supervision or control of the United States Department of Justice for any purpose, including the provisions of 18 U.S.C. § 203(c) or § 205." In re Michael K. Deaver, Division No. 86-2, Designation of Special Government Employees, at 1-2 (July 2, 1986); In re Michael K. Deaver, Division No. 86-2, Designation of Special Government Employees, at 2 (Sept. 19, 1986). The source of the Special Division's authority to enter such "orders" is, to say the least, unclear.

behalf of any clients. Further, at the request of Representative John D. Dingell's Oversight Subcommittee of the House Committee on Energy and Commerce, the independent counsel also expanded his investigation to include allegations that Deaver might have committed perjury in testimony he had given before the subcommittee in May 1986. Finally, the independent counsel expanded the number of persons within his jurisdiction, telling a number of individuals besides Deaver that they were subjects or targets of his investigation.

Seven months into his investigation, however, the independent counsel apparently felt some need for reassurance as to the scope of his jurisdiction. Accordingly, he secretly filed an ex parte petition with the Special Division seeking "clarification" of his jurisdiction to prosecute Deaver based upon the Dingell

subcommittee perjury charges, to prosecute persons other than Deaver for alleged offenses arising out of their employment with Deaver's firm, and to prosecute persons who may have obstructed the investigation or given false testimony before the grand jury. On December 16, 1986, the Special Division granted the independent counsel's petition and issued an order, as requested, that amended and supplemented its order of May 29. [3/].

[3/] The Special Division's Order purported to give the independent counsel jurisdiction to investigate and prosecute the Dingell subcommittee perjury allegations as well as charges against (1) any person who conspired with or aided and abetted Deaver to violate any federal law, (2) any person who violated 18 U.S.C. § 207 or any other federal criminal law in the course of any of his or her duties as an officer or employee of Deaver's firm, and (3) any person who obstructed justice or committed perjury in connection with Deaver's investigation. In re Michael K. Deaver, Division No. 86-2, Supplemental Order (D.C. Cir. Dec. 16, 1986).

Fortified by the Special Division's ratification of his expansive view of his jurisdiction, the independent counsel informed Deaver's attorneys on February 24, 1987, that he intended to obtain an indictment the next afternoon charging Deaver with perjury.

3. Litigation Commences Over the Constitutionality of the Independent Counsel Statute

The next morning, February 25, 1987, Deaver filed a civil action seeking injunctive and declaratory relief against the threatened indictment on the ground that the independent counsel's exercise of prosecutorial authority violated the constitutional principle of separation-of-powers. After hearing argument, the district court granted a temporary restraining order stating that it was "genuinely troubled by a statute which gives Congress the power to confer power

upon a court to confer upon a private citizen the powers of the Attorney General of the United States," (Tr. 2/25/87 at 23), and was "also concerned about . . . [the independent counsel's] responsibility to justify whatever it is that you do in your office to committees of Congress." (Id. at 24).

Fifteen days later, however, the district court denied Deaver's motion for a preliminary injunction on this issue, ruling primarily that Deaver had an adequate remedy at law in the form of a motion to dismiss any indictment that might be returned against him. (Pet. App. E, p. 49a) [4/] Deaver immediately appealed

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[4/] The district court also ruled that Deaver had not shown that he was likely to (cont'd.)

this denial of preliminary relief. After entering a brief stay of proceedings, however, the United States Court of Appeals for the District of Columbia Circuit summarily affirmed the district court's decision, without reaching the merits of Deaver's constitutional arguments or expressing any opinion regarding them at the time. Deaver v. Seymour, No. 87-5056 (D.C. Cir. March 17, 1987 (per

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prevail on the merits of his consitutional claim, but observed that it was "unconvinced that any result is clearly foreordained by the authorities so far cited," and that, in its view, "[t]he prospect of a citizen-prosecutor, who is: (1) chartered by an Article III court of special jurisdiction proceeding ex parte in closed session; (2) armed with all of the powers of the Attorney General of the United States but only minimally accountable -- and that to Congress and the special court -- for their use; and (3) removable only for provable improprieties or personal debility, is a constitutional hybrid which neither the framers of the Constitution nor any court since expressly contemplated." (Pet. App. E, pp. 50a-51a).

curiam order). [5] After Deaver unsuccessfully sought a stay from Circuit Justice Rehnquist, the independent counsel went before the grand jury on March 18, 1987, and obtained the perjury indictment he had promised three weeks before. [6]

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[5] At the time it entered this order, the Court of Appeals noted that it would subsequently issue a full opinion explaining the reasons for its decision. When this opinion finally issued, (see Pet. App. B) it described "Deaver's challenge [a]s a serious one with far-ranging and troubling constitutional implications." (Id., p. 29a).

[6] The first two counts of this indictment charge Deaver with committing perjury before Representative Dingell's subcommittee on May 16, 1986. The third count alleges that Deaver falsely stated to Seymour's grand jury that he did not recall making any government contacts on behalf of his client TransWorld Airlines. The fourth count charges that Deaver made false declarations to the grand jury concerning his presence at various meetings where the acid rain issue was discussed while he was working in the White House. The fifth count concerns an alleged conversation Deaver had with Robert McFarlane regarding the amendment of § 936 of the tax code. Only the last two counts relate to the allegations originally referred to the Special Division by the Attorney General. See n.1, supra.

During the routine course of post-indictment proceedings thereafter, Deaver renewed his separation-of-powers challenge to the independent counsel statute through a motion to dismiss the indictment under Rule 12(b)(1) of the Federal Rules of Criminal Procedure. In that motion, Deaver argued: (1) that by removing a portion of the investigative and prosecutorial power of the United States from the control of the President and his agents, the statute infringes the President's exclusive authority and duty to "take Care that the Laws be faithfully executed," U.S. Const., Art. II, § 3; (2) that the statute impermissibly vests the Congress and, in particular, the courts with supervisory authority over the execution of the laws; (3) that the statutory provision for appointment of independent counsel by a court rather than by the President violates the Appointments

Clause, U.S. Const., Art. II, § 2, because the independent counsel either is not an "inferior officer" or is a type of "inferior officer" whose appointment by a court of law violates the principle of "incongruity" set forth in Ex parte Siebold, 100 U.S. 371 (1880); (4) that the statute unconstitutionally limits the President's power to remove an officer performing purely executive functions, in violation of the principle of Myers v. United States, 272 U.S. 52 (1926); and (5) that the statute permits a court to remove an executive officer, in violation of the Supreme Court's ruling in Bowsher v. Synar, 106 S.Ct. 3181 (1986). In addition, Deaver argued that these constitutional defects on the face of the statute had been compounded in the course of the statute's application to him because the independent counsel had

assumed jurisdiction over matters that the Attorney General had never deemed appropriate for investigation by an independent counsel, had accepted the "referral" of charges by a congressional subcommittee, and had sought and obtained nonjudicial "orders" from the Special Division of this Court directing him in the performance of his duties.

By Order dated May 13, 1987, the district court denied Deaver's motion to dismiss the indictment, while simultaneously stating that it "remain[ed] not altogether convinced of the constitutionality of the independent counsel provisions of the Ethics in Government Act of 1978." (Pet. App. C, pp. 40a-41a). The court's decision relied on "the reasons summarily set forth in its Memorandum and Order of March 11, 1987, in Deaver v. Seymour," in which the court had briefly stated its view that the statute

would "likely" be held constitutional. Id. 7/ Deaver moved for reconsideration of the district court's order including, as that court had directed, a factual proffer supporting his argument that the statute had been unconstitutionally applied to him as a result of the improper exercise of congressional and judicial influence upon the independent counsel and his assumption of jurisdiction over matters never referred by the Attorney General. 8/ On May 21, 1987, the district court denied, without explanation, Deaver's motion for reconsideration. (Pet. App. D).

7/ The district court also "assume[d] without deciding that it [might] be bound" by the Special Division's dicta regarding the constitutionality of the statute in In re Theodore Olson, Division No. 86-1 (D.C. Cir. April 2, 1987). Id.

8/ Deaver also argued that the district court's decision on this issue could not properly be based on its earlier prediction of the "likelihood" that a statute of whose constitutionality the (cont'd.)

4. Interlocutory Appeal of the Constitutional Issue is Attempted and Rejected

After conferring informally with the trial judge and the independent counsel,[9/]

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court was "not altogether convinced" would ultimately be upheld, and that the district court's "assumption" that it was bound by Olson was unfounded in view of the Special Division's clear lack of jurisdiction to issue a decision binding on the constitutionality of the statute in any proceeding. See 28 U.S.C. § 49(f).

9/ At a status conference held in chambers on May 21, 1987, lead counsel for Deaver informed the trial judge and the independent counsel that he thought the ruling on the separation-of-powers challenge to the independent counsel statute might be the proper subject of interlocutory appeal under a trilogy of circuit court decisions -- United States v. Claiborne, 727 F.2d 842 (9th Cir. 1984); United States v. Hastings, 681 F.2d 706 (11th Cir. 1982); United States v. Myers, 635 F.3d 932 (2d Cir. 1980) -- and that he was concerned the issue might be waived, if such an appeal was not attempted, under reasoning like that employed by this Court in United States v. Mechanik, 106 S.Ct. 938 (1986). After hearing this, the trial judge indicated that he understood completely the reasons for attempting such an appeal of this substantial issue and that he would do whatever was appropriate to accomodate such appellate proceedings schedule-wise.

Deaver noticed an appeal from the adverse decisions on his constitutional claims on May 26, 1987, within ten days (as calculated under Fed. R. App. Pro. 26(a)) of both the denial of the motion to dismiss on May 13, 1987, and the denial of reconsideration on May 21, 1987. Simultaneously with the filing of this notice, Deaver filed a motion for expedited consideration of his appeal explaining that appeal of this issue fully satisfied the criteria of the collateral order doctrine and entailed determination of the independent counsel's very right to force Deaver to endure a criminal trial, a right which would obviously be irreparably lost if an appeal was not allowed before the trial at issue. Deaver's motion also proposed a highly expedited briefing and

argument schedule to resolve this important constitutional issue. 10/ Two days later, the independent counsel filed a motion to dismiss the appeal for lack of jurisdiction, claiming that the ruling below was nonfinal and fully reviewable on any appeal taken at the conclusion of proceedings in the district court. Deaver opposed the independent counsel's motion by demonstrating the shortcomings in its jurisdictional analysis and highlighting the many reasons commanding the exercise of jurisdiction over this appeal by the Court of Appeals.

In a brief Order dated June 15, 1987, the Court of Appeals granted the independent counsel's motion to dismiss

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10/ Alternatively, Deaver requested the Court of Appeals to issue a writ of mandamus directing the district court to decide the constitutional question without relying on either its prior preliminary injunction findings or the Special Division's Olson opinion.

Deaver's appeal. (Pet. App. A). [11] The court simply stated (id., pp. 2a-3a):

> The district court's order denying appellant's motion to dismiss the indictment is not a final order, and therefore is unappealable. 28 U.S.C. § 1291. We find no reason to make an exception in this case. See Cohen v. Beneficial Ind. Loan Corp., 337 U.S. 541 (1949); Deaver v. Seymour, No. 87-5056, slip op. (D.C. Cir. June 15, 1987).

The court expressed no opinion whatsoever on the merits of Deaver's constitutional claims, although the simultaneously issued slip opinion decision relied upon by the court characterized the claims as "serious . . . with far-ranging and troubling

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[11] Simultaneously, the Court of Appeals dismissed Deaver's motion for expedited consideration as moot and denied his request for a writ of mandamus, although it instructed the district court that it was not bound by either the Special Division's Olson opinion or its own earlier nonfinal - preliminary injunction findings. Id. at 3a-4a.

constitutional implications." (Pet. App. B, p. 29a). This petition to this Court followed in short order.

REASONS FOR GRANTING THE WRIT

We think it fair to say that there is no more openly debated and publicly important question of law today than the constitutionality of the independent counsel provisions of the EIGA. Just three days ago, the United States Department of Justice publicly attacked the statute's creation of federal prosecutors unaccountable to the Executive Branch as an unconstitutional infringement of that branch's absolute power and duty to enforce federal criminal law. (See Washington Post, p. A1, "Justice Dept. Attacks Special Counsels" June 17, 1987)). 12/ At present, there are six

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12/ The Department of Justice has long (cont'd.)

independent counsels conducting separate investigations of mostly highly visible, but some secret, allegations that federal criminal law has been violated by individuals subject to the statute. If the independent counsel statute is indeed unconstitutional, those ongoing investigations are a monumental waste of

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questioned the statute's constitutionality in varying degrees. This most recent and strongest articulation of its position on the statute was made, according to the Department, because of "[r]ecent developments [that] have confirmed [its] constitutional concerns about the dangers inherent in the operation of the independent counsel statute." Id. One of those influential recent developments was the international incident caused by the unprecedented decision of the independent counsel in this case to subpoena the Canadian ambassador as a trial witness, over the objections of the Canadian government and the State Department, and "in defiance of the most basic principles of diplomatic immunity." Id.

governmental resources, 13/ as well as a severe and massive intrusion into individual rights, that should be abruptly brought to a halt. If, on the other hand, the statute is constitutional, the issue should be settled so that the investigations may proceed unhindered. In either event, delay in the resolution of this issue is inimical to the interest of the public. As demonstrated below, this petition presents this Court with the opportunity to serve this public interest by resolving this important issue now.

I.

The Separation-Of-Powers Challenge To This Indictment Must, As Three Other Circuit Courts Have Found, Be Appealable Now

The initial question presented on

13/ The Department of Justice has estimated that the presently operating independent counsels will have expended over $6 million worth of public funds in the conduct of their investigations by the end of this calendar year. (See Washington Post, p. A18 (June 17, 1987)).

this petition concerns the Court of Appeals ruling that there was "no reason," (Pet. App. A, p. 2a), to permit a pretrial appeal of Deaver's constitutional challenge to the independent counsel's exercise of prosecutorial authority against him. Interlocutory appeal by a defendant in a criminal case is, of course, the exception and not the rule. See United States v. Hollywood Motor Car Co., 458 U.S. 263 (1982). Nonetheless, an immediate appeal of right from the denial of a pretrial motion to dismiss an indictment is available to a defendant under 28 U.S.C. § 1291 where the trial court's decision "fall[s] in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred

until the whole case is adjudicated." Abney v. United States, 431 U.S. 651, 658-659 (1977) (quoting Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949)). 14/ The order denying Deaver's motion to dismiss on separation-of-powers grounds is just such a decision.

Deaver's claim that the independent counsel's exercise of prosecutorial authority under the EIGA violates the principle of separation of powers is not, as the court below held, "merely [a] claim[] that [the independent counsel] is not qualified to direct the prosecution,"

14/ The Court of Appeals incorrectly focused its analysis of the question of interlocutory appealability on whether Deaver's claim should create "an exception" to the final order rule. (Pet. App. A, p. 3a). In fact, Cohen and its progeny provide a set of criteria for determining when an order that is in form interlocutory nonetheless satisfies the finality requirement. No special "exception" is necessary in such circumstances.

(Pet. App. B, p. 27a), of an otherwise lawful trial proceeding. No other "qualified" prosecutor could walk in and constitutionally try this case against Deaver either, for the entire case has been put together by, and all the evidence has been gathered through, the independent counsel's exercise of unconstitutional prosecutorial authority. 15/. Thus, through his separation-of-powers challenge, Deaver is quite literally "contesting the very authority of [the independent counsel] to hale him into court to face trial on the charges against him." Abney v. United States, 431 U.S. at 659. He is fully asserting a right, grounded in the Constitution, to be free

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15/ This does not mean, of course, that Deaver can never be prosecuted; it merely means that any prosecution of him must await a lawful investigation by a constitutional prosecutor.

completely from this entire trial proceeding, not just the independent counsel's participation in it.

The district court's rejection of this claim possesses all the characteristics of a decision that is appealable under the "collateral order" doctrine of Cohen v. Beneficial Industrial Loan Corp., supra. First, the district court's ruling "constitute[s] a complete, formal, and, in the trial court, final rejection" of Deaver's claim, for "[t]here are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred . . . ." Abney v. United States, supra, 431 U.S. at 659. Second, the separation-of-powers issue is obviously "collateral to, and separable from, the principal issue at the accused's impending trial, i.e., whether or not the accused is guilty of the offense charged." Id. at 659. Third,

the claim is "too important to be denied review" at this time, Cohen, supra, 337 U.S. at 546, not only because it presents "a serious and unsettled question," id. at 547, but also because the claim is that the trial itself may not constitutionally proceed, and such a claim "cannot be effectively vindicated after the trial has occurred." Mitchell v. Forsyth, 105 S.Ct. 2806, 2815 (1985); accord, Abney v. United States, supra, 431 U.S. at 659-662; see also Helstoski v. Meanor, 442 U.S. 500, 508 (1979); Nixon v. Fitzgerald, 457 U.S. 731, 742-743 (1982).

The appealability of the district court's order is indicated not only by the general principles of the collateral order doctrine, which were unfortunately largely ignored by the court below, but also by the uniform precedents specifically applicable to claims that a pending prosecution violates the principle of

separation-of-powers. The foremost of these precedents is the Supreme Court's decision in Helstoski v. Meanor, supra, holding that in order to protect the "constitutional command of separation of powers," 442 U.S. at 505, as incorporated in the Speech or Debate Clause (Art. I, § 6), an interlocutory appeal must be allowed when a district court denies a motion to dismiss based upon "the fundamental guarantees" of that Clause. Id. at 507-508. In three more recent cases, the Eleventh, Second, and Ninth Circuits have applied the reasoning of Helstoski (as well as of Abney and Cohen) to hold that an interlocutory appeal is available from the denial of a motion to dismiss based upon the assertion that a pending prosecution is barred by "general principles of separation of powers." United States v. Hastings, 681 F.2d 706, 708 (11th Cir. 1982) (holding appealable

the claim that separation-of-powers principles bar prosecution of a sitting federal judge); accord, United States v. Myers, 635 F.2d 932, 935-936 (2d Cir. 1980) (holding appealable the claim that separation-of-powers principles bar bribery prosecution of a congressman); United States v. Claiborne, 727 F.2d 842, 844-845 (9th Cir. 1984) (holding appealable the claim that separation-of-powers principles bar prosecution of a sitting federal judge). 16/ In all three

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16/ The courts in Hastings, Myers, and Claiborne noted that the claims before them were grounded in the notion that the prospect of criminal trial would have a chilling effect on the performance of members of the Legislative and Judicial Branches, and for this reason, pretrial review of the merits of these claims was particularly necessary. Deaver's claim similarly implicates the right of Executive Branch officials to be free from the chilling effect of prosecution at the behest of a prosecutor whose powers are unrestrained by the ordinary process of supervision by the Chief Executive and his agents. Significantly, Count Four of the indictment against Deaver is concerned (cont'd.)

cases, the courts recognized that the claim that the trial itself was barred by the principle of separation-of-powers was one that could not be effectively reviewed "if [the defendant] were forced to undergo trial before he could assert it." Hastings, supra, 681 F.2d at 708; accord, Myers, supra, 635 F.2d at 935; Claiborne, supra, 727 F.2d at 844. As the Second Circuit explained:

> Though [the] doctrine [of separation of powers] does not provide as precise a protection as the Speech or Debate Clause, there are equivalent reasons for vindicating in advance of trial whatever protection it affords as a defense to prosecution on criminal charges. If, because of the separation of powers, a particular prosecution . . . is constitutionally prohibited,

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completely with meetings he attended and discussion he allegedly participated in while he was working in the White House, as a member of the Executive Branch. As in Hastings, Meyers, and Claiborne, therefore, the propriety of this chilling effect should be resolved at this time.

> the policies underlying that doctrine require that the [defendant] be shielded from standing trial.

Myers, supra, 635 F.2d at 935. 17/

The decision of the Court of Appeals below thus conflicts with the plain holdings of the Second, Ninth and Eleventh Circuit Courts of Appeal that substantial

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17/ The necessity of an appeal at this time is further indicated by the possibility that Deaver's challenge to the independent counsel's authority to initiate proceedings against him might be considered to be analogous to the claims of error in the grand jury process that this Court has held to be "harmless" once a petit jury has rendered a verdict of guilty. United States v. Mechanik, 106 S.Ct. 938 (1986). Indeed, such a finding might well flow naturally from the Court of Appeals' characterization of Deaver's claim as a simple process-oriented complaint about the qualifications of the prosecutor. If that were the case, Deaver's claim might be completely unreviewable on appeal from a final judgment, and allowance of an interlocutory appeal would obviously be essential to the vindication of the claim. See United States v. Benjamin, 812 F.2d 548 (9th Cir. 1987) (holding that in light of Mechanik, a claim of a violation of Fed. R. Crim. P. 6(e)(2) must be (cont'd.)

separation-of-powers challenges to a criminal proceeding are the proper subject of interlocutory appeal. We have found no separation-of-powers holding to the contrary. A defendant's right to interlocutory appeal of an issue as substantial as this separation-of-powers challenge [18] should not depend upon

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appealable before trial under 28 U.S.C. § 1291). Unfortunately, the Court of Appeals never addressed these concerns derived from Mechanik, although we expressly raised the issue in that court.

[18] Curiously, the Court of Appeals used the substantiality of Deaver's separation-of-powers claim as a ground for denying his interlocutory appeal under the guise of fulfilling its "obligation to avoid constitutional questions." (Pet. App. B, p. 29a). As that court reasoned: "If appellant is acquitted of the charges brought against him, we of course would not be obliged to decide this constitutional issue." (Id., p. 30a). This is an improper application of the principle of constitutional avoidance, as revealed by the facts that it would embargo the most important of all rights -- constitutional rights -- from ever being the subject of interlocutory appeal and that it is fully in conflict with the (cont'd.)

the federal district in which he is prosecuted. As a result of the split in the Circuits created by the decision below, it now does.

The decision below also runs counter to this Court's own previous pronouncements on when interlocutory appeal in a criminal case is proper. As this Court noted in Helstoski, supra, protecting the "constitutional command of separation-of-powers," 442 U.S. at 505, is just such a proper occasion, especially when, as here, the requirements of the Cohen collateral order doctrine are also satisfied. This is not the type of appeal

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established pretrial appealability of constitutional questions under the Speech or Debate and Double Jeopardy Clauses. This Court's precedents have routinely recognized that substantiality of the issue is a necessary ingredient of an interlocutory appeal; it is not a factor counselling against one.

whose allowance will open the floodgates to interlocutory appeals in the criminal courts; occasions to raise substantial separation-of-powers issues are typically quite rare. 19/ This is the type of issue, however, that demands immediate attention. 20/

II.

The Independent Counsel Provisions Of The EIGA Are Patently Unconstitutional

Although the Court of Appeals decision below considered only the

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19/ Potent proof of this point lies in the fact that we have uncovered only two such interlocutory appeals -- Hastings and Claiborne -- since the Myers court first sanctioned such appeals almost seven years ago.

20/ Moreover, if Deaver's constitutional challenge proves accurate and is upheld, then the interest of judicial economy will actually be served in the long run by avoidance of the many wasteful and needless proceedings in the offing right now.

question of the pretrial appealability of Deaver's separation-of-powers claim, and not its merits, this Court is not so restricted in its ability to resolve this case. As long ago as 1855, this Court recognized that in reversing a Court of Appeals, it may make such decree as the court below should have made. Wickliffe v. Owings, 17 How. 47 (1855). 21/ Since that time, the enactment of 28 U.S.C. § 2106 has expressly empowered this Court in reviewing cases before it to do whatever is "just under the circumstances," 28 U.S.C. § 2106, which the Court has read as authority to render final decisions on questions, including those of constitutional right, not decided below. See Grosso v. United States, 390 U.S. 62, 71-

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21/ Accord, O'Leary v. Brown-Pacific-Maxon, 340 U.S. 504, 508 (1951); Baker v. Warner, 231 U.S. 588, 593 (1913).

72 (1968). 22/ When the issue on the merits is purely legal, as this one is, and has been fully developed in the record, there is no reason for this Court not to, and every reason for it to, "address the important constitutional issues at stake" under its "plenary scope of review as to the applicable law." Thornburgh v. American College of Obstetricians and Gynecologists, 106 S.Ct. 2169, 2177 (1986) (citation omitted). 23/

On the merits, every court that has considered this issue to date has acknowledged, as has the independent counsel himself, that the constitutional concerns surrounding this statute are

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22/ Accord, United States v. Covington, 395 U.S. 57, 61 (1969); Haynes v. United States, 390 U.S. 85, 100-101 (1968); Forman v. United States, 361 U.S. 416, 426 (1960).

23/ Accord, Perkins v. Matthews, 400 U.S. 379, 386 (1971); United States v. Seckinger, 397 U.S. 203, 209 (1970).

serious and substantial. The Department of Justice has gone even further, maintaining that the statute is patently unconstitutional. This is neither the time nor the place, nor do we have the space, to set forth in detail the arguments against the statute's constitutionality, although some of them have been referred to earlier. See pp. 22-23, supra. Suffice it to say that the independent counsel statute's grant of authority to enforce federal criminal law to a private citizen unaccountable to the Executive Branch constitutes a multi-faceted assault on the fundamental principles that it is the President who is empowered to "take Care that the Laws be faithfully executed," Art. II, § 3; that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case," United States v. Nixon, 418 U.S. 683, 693

(1974) (emphasis added); and that "the principle of Executive control extends to all phases of the prosecutorial process." Nathan v. Smith, 737 F.2d 1069, 1079 (D.C. Cir. 1984) (Bork, J., concurring) (emphasis added).

The seriousness of the question presented has been dramatically underscored by this Court's recent ruling in Young v. United States ex rel. Vuitton et Fils, No. 85-1329 (U.S. May 26, 1987). In that case, the Court held that the court appointment of private attorneys to prosecute criminal contempts does not violate the principle of separation-of-powers, but only because the judiciary has the inherent power to punish contempts in order "to vindicate its own authority without complete dependence on other branches." Id., slip op. at 8. This inherent authority to punish contempts, the Court noted, is not analogous to the

"execution of the criminal law in which only the executive branch may engage." Id. at 11 (emphasis added). "Acknowledging the limited authority of courts to appoint contempt prosecutors thus provides no principle that can be wielded to eradicate fundamental separation-of-powers boundaries." Id. at 12, n.20 (emphasis added). As Justice Scalia observed, the Court's opinion creating "a special exception for prosecutions of criminal contempt" does not contest the "well settled general principl[e]" that "since the prosecution of law violators is part of the implementation of the laws, it is -- at least to the extent that it is publicly exercised -- executive power, vested by the Constitution in the President." Id., (Scalia, J.) concurrence in judgment, at 3 (emphasis added).

In addition to this overriding

question of the constitutional legitimacy of the statute's transfer of core executive power away from the Executive Branch, the independent counsel statute also creates a number of related and equally substantial constitutional questions, such as the propriety of the appointment of an independent counsel by a court; the propriety of the potential removal of an independent counsel by a court, together with the significant restrictions on the executive branch's ability to remove such counsel; the propriety of a court defining an independent counsel's investigative and prosecutorial jurisdiction; and the propriety of authorizing a court and the Congress to oversee the independent counsel's exercise of executive power. All things considered, this separation-of-powers challenge to the constitutionality of the independent counsel statute

undeniably makes this case one involving questions of importance which it is in the public interest to have decided by this court of last resort." Magnum Import Company v. De Spoturno Coty, 262 U.S. 159, 163 (1923). The country needs to know now whether this law, and the extensive and expensive proceedings being conducted under it, are lawful or not.

CONCLUSION

This case presents this Court squarely with an opportunity to resolve finally the continuing, substantial and paralyzing debate over the constitutionality of the independent counsel statute. There are no factual complications to counsel against review of this issue in this case; to the contrary, the legal issues have been completely preserved and are cleanly presented for review. The separation-of-powers issues

underlying this constitutional challenge go to the very heart of our system of government, and to the very right of an independent counsel to do anything as a federal prosecutor, least of all force an individual, a court and twelve jurors to endure a five-week-long criminal trial. The nature and effect of this challenge are such as to necessitate pretrial appellate review, as the unanimous decisions that conflict with the decision below have recognized. The nature and effect of this challenge are also such as to warrant immediate review by this Court, as previous pronouncements of this Court and events recounted almost daily by the press readily reveal.

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 19, 1987

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-3028 September Term 1986

UNITED STATES OF AMERICA

v.

FILED
June 15, 1987

MICHAEL K. DEAVER,

Appellant

BEFORE: Edwards, Buckley, and Williams, Circuit Judges

O R D E R

Upon consideration of appellant's Motion for Expedited Consideration and Request of Mandamus, and appellee's Motion to Dismiss, it is

ORDERED by the court that the Motion to Dismiss be granted. The district court's order denying appellant's motion to dismiss the indictment is not a final order, and therefore is unappealable. 28

U.S.C. § 1291. We find no reason to make an exception in this case. See Cohen v. Beneficial Ind. Loan Corp., 337 U.S. 541 (1949); Deaver v. Seymour, No. 87-5056, slip op. (D.C. Cir. June 15, 1987). It is

FURTHER ORDERED that appellant's Motion for Expedited Consideration be dismissed as moot. It is

FURTHER ORDERED that appellant's Request for Mandamus be denied. Mandamus is an extraordinary remedy to be invoked only in drastic circumstances. Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 34 (1980). There are no such extraordinary circumstances presented here. We note, however, that the Special Division, see In re Theodore Olson, Division No. 86-1 (D.C. Cir. April 2, 1987), is without authority to bind the district court. 28 U.S.C. § 49. We note further that in denying appellant's motion to dismiss the indictment the district

court relied on its reasoning in Deaver v. Seymour, 656 F.Supp. 900, 902 n.3 (D.D.C. 1987) (order denying preliminary injunction). Although in deciding whether to grant the preliminary injunction the district court properly considered the probability of success on the merits, such consideration is not a final determination on the merits and is not binding in further proceedings. Industrial Bank of Washington v. Tobriner, 405 F.2d 1321, 1324 (D.C. Cir. 1968) (per curiam).

The Clerk is directed to issue the mandate forthwith.

Per Curiam

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED
June 15, 1987

No. 87-5056

Michael K. Deaver,

Appellant

v.

Whitney North Seymour, Jr., as
Independent Counsel, et al.

Appeal from the United States District
Court for the District of Columbia
(Civil Action No. 87-00477)

On Appellant's Emergency
Motion for a Stay

Filed June 15, 1987

Herbert J. Miller, Jr., Randall J. Turk and Stephen L. Braga were on the motion

Whitney North Seymour, Jr. and George F. Hritz were on the opposition.

MICHAEL K. DEAVER v. WHITNEY NORTH SEYMOUR, JR., No. 87-5056

Before: SILBERMAN, WILLIAMS and D.H. GINSBURG, Circuit Judges.

Opinion for the Court filed by Circuit Judge SILBERMAN.

Separate Concurring Statement filed by Circuit Judge D.H. GINSBURG.

SILBERMAN, Circuit Judge: This case involves a challenge by former White House Deputy Chief of Staff Michael K. Deaver to the constitutionality of the independent counsel provisions of the Ethics in Government Act, 28 U.S.C. §§ 49, 591-98 (1982 & Supp. III 1985). Deaver filed a civil complaint in federal district court seeking declaratory and injunctive relief from independent counsel Whitney North Seymour, Jr.'s continued exercise of prosecutorial authority. Following the district court's denial of his motion for a preliminary injunction, Deaver appealed

to this court and moved for an Emergency Stay to preserve the status quo until we determined the constitutionality vel non of the Act. He alleged that absent a stay he would suffer imminent, irreparable harm in the form of a criminal indictment obtained by Seymour. In an Order dated March 17, 1987, we held that Deaver's lawsuit constituted an impermissible preemptive civil challenge to a criminal proceeding. Accordingly, we denied the motion for Emergency Stay, and on our own motion, summarily affirmed the district court's denial of a preliminary injunction. We then ordered the case remanded to the district court with directions to dismiss the complaint. We now explain that decision.

I.

From 1981 until 1985, Michael Deaver served as White House Deputy Chief of

Staff and Assistant to the President of the United States. In May of 1985, Deaver left his position at the White House and established the firm of Michael K. Deaver and Associates, a lobbying association of which he is the president. Thereafter, Deaver's contacts with government officials on behalf of his clients became the object of public scrutiny. On April 23, 1986, five members of the United States Senate wrote to the Attorney General and, pursuant to 28 U.S.C. § 595(e)(1982), [1]

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[1] Section 595(e) provides:

> A majority of majority party members or a majority of all nonmajority party members of the Committee on the Judiciary of either House of the Congress may request in writing that the Attorney General apply for the appointment of a[n] independent counsel. Not later than thirty days after the receipt of such a request, or not later than fifteen days after the completion of a preliminary investigation of the matter with

(cont'd.)

requested the appointment of an independent counsel to investigate Deaver's lobbying activities. Amid growing public speculation concerning the possible impropriety of his contacts with former White House associates on behalf of his clients, Deaver himself requested that

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respect to which the request is made, whichever is later, the Attorney General shall provide written notification of any action the Attorney General has taken in response to such request and, if no application has been made to the division of the court, why such application was not made. Such written notification shall be provided to the committee on which the persons making the request serve, and shall not be revealed to any third party, except that the committee may, either on its own initiative or upon the request of the Attorney General, make public such portion or portions of such notification as will not in the committee's judgment prejudice the rights of any individual.

an independent counsel be appointed. Finding reasonable grounds to warrant further investigation or prosecution, the Deputy Attorney General on May 22, 1986 applied to a special division of this court for appointment of an independent counsel. 2/ The application detailed alleged attempts by Deaver to lobby the White House on behalf of two clients, the Government of Canada and the Commonwealth of Puerto Rico, and requested an investigation to determine whether

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2/ The Act provides for the assignment of three circuit judges to a division of the United States Court of Appeals for the District of Columbia Circuit for the purpose of appointing independent counsels. See 28 U.S.C. § 49 (1982). If the Attorney General, upon completion of a preliminary investigation, finds "reasonable grounds" to believe that further investigation or prosecution is warranted, or, if within ninety days arfter receiving "information" sufficient to preliminarily investigate a person, fails to find that no investigation or prosecution is warranted, then the Attorney General "shall apply to the division of the court for appointment of (cont'd.)

prosecution was warranted for violations of 18 U.S.C. § 207 (1982) [3] or any other federal criminal law.

One week later, the court appointed Whitney North Seymour, Jr. to serve as independent counsel. After organizing a staff and arranging for a grand jury, Seymour began a nine-month investigation into Deaver's lobbying activities. On February 24, 1987, Seymour informed Deaver that he was about to ask the grand jury to return an indictment. The next day, Deaver filed this civil action claiming

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a[n] independent counsel." 28 U.S.C. § 592(c)(1) (1982). The Attorney General recused himself from this matter and appointed the Deputy Attorney General to act in his place.

[3] Section 207 prohibits former high-level federal employees from lobbying the government under certain circumstances in connection with matters for which they had responsibility as government officals.

the Ethics in Government Act is unconstitutional because it vests prosecutorial authority, which belongs exclusively to the Executive branch, in an individual who is not subject to presidential appointment, control, or removal. Deaver moved to enjoin preliminarily Seymour's efforts to obtain an indictment, contending that immediate and irreparable harm would befall him if equitable relief were not granted. He asserted that if Seymour's activities were not halted, he would suffer the "continuing destruction of his business," "injury to his reputation and dignity," and "the expenditure of substantial resources in his defense."

The district court temporarily restrained Seymour from seeking an indictment. Later, however, applying the four-part test set out by this court in Washington Metro Area Transit Comm'n v.

Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977), the court denied the motion for preliminary injunction. The district court concluded that any harm Deaver might suffer as a result of a criminal indictment was not irreparable because there existed an adequate remedy at law, since Deaver could move to dismiss the charges under Federal Rule of Criminal Procedure 12(b)(1) for "defects in the institution of the prosecution." The court also concluded that Deaver had failed to demonstrate the likelihood of ultimate success on the merits because, in the district court's view, the Act would probably not be found to offend the Constitution. Finally, the court concluded the public interest required that any possible violations of the criminal law be speedily prosecuted, an interest most likely secured by allowing Seymour immediately to seek an indictment.

Although the denial of Deaver's application for a preliminary injunction is an interlocutory order appealable under 28 U.S.C. § 1292(a)(1) (1982), [4] the district court in addition certified for this court's review the question of the constitutionality vel non of the Act as a "controlling question of law" pursuant to 28 U.S.C. § 1292(b) (1982). [5]

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[4] Section 1292(a)(1) provides "[T]he courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions. . . ." 28 U.S.C. § 1292(a)(1) (1982).

[5] Section 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he

(cont'd.)

Deaver immediately appealed the district court's order and sought emergency injunctive relief to preclude an indictment pending our review. We entered a five-day administrative stay and ordered the parties to file supplemental briefs.

On March 17, 1987, after considering the supplemental briefs, we dissolved our administrative stay, denied Deaver's Emergency Motion for Stay, affirmed the district court's denial of his motion for a preliminary injunction, and remanded the case with directions to dismiss the complaint.

II.

The district court, applying the Holiday Tours test, thought it necessary

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> shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order . . . .

28 U.S.C. § 1292(b) (1982).

to consider the likelihood that appellant would succeed on the merits of his constitutional challenge to the authority of the independent counsel. We do not. Even were we disposed to agree entirely with appellant's constitutional argument, we think he has no right to an injunction restraining a pending indictment in a federal court.

The traditional rule, dating back to the English division between courts of law and equity, was that the latter had "no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors" and therefore could not enjoin criminal proceedings, In re Sawyer, 124 U.S. 200, 210 (1888). Departing somewhat from this rule around the turn of the century, the Supreme Court in certain cases permitted federal courts to issue

injunctions against state court criminal proceedings that threatened federal constitutional rights. See, e.g., Dobbins v. Los Angeles, 195 U.S. 223, 241 (1904) (court of equity may enjoin criminal prosecution under void law where property rights would otherwise be destroyed); Truax v. Raich, 239 U.S. 33, 38 (1915) (court may enjoin enforcement of unconstitutional criminal law when essential to protect right to earn a livelihood). A federal injunction was available to prevent state officers from instituting criminal proceedings "under extraordinary circumstances where the danger of irreparable loss [of a constitutional right was] both great and immediate." See Fenner v. Boykin, 271 U.S. 240, 243 (1926).

More recently however, the Court, troubled by notions of comity, tightened the criteria for granting federal injunctions that interfere with state criminal proceedings, holding that the "cost, anxiety, and inconvenience of having to defend against a single criminal prosecution" are not recognized as irreparable injuries justifying an equitable remedy. Younger v. Harris, 401 U.S. 37, 46 (1971). See also Bokulich v. Jury Commission of Greene County, 394 U.S. 97, 98 (1969); Spielman Motor Sales Co., Inc. v. Dodge, 295 U.S. 89, 96 (1935). Although it is surely true that an innocent person may suffer great harm to his reputation and property by being erroneously accused of a crime, all citizens must submit to a criminal prosecution brought in good faith so that larger societal interests may be preserved. See Douglas v. City of

Jeannette, 319 U.S. 157, 163 (1943); Beal v. Missouri Pacific R.R. Corp., 312 U.S. 45, 49 (1941). As Justice Frankfurter explained, "[b]earing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." Cobbledick v. United States, 309 U.S. 323, 325 (1940).

Thus, in the past few decades, the Supreme Court has upheld federal injunctions to restrain state criminal proceedings only where the threatened prosecution chilled exercise of First Amendment rights, see, e.g., Wooley v. Maynard, 430 U.S. 705 (1977) (threatened enforcement of unconstitutional statute requiring "Live Free or Die" motto on car license plate against those covering up the motto); Doran v. Salem Inn, Inc. 422 U.S. 922 (1975) (ordinance banning topless dancing, enforcement of which threatens to

bankrupt petitioner); Dombrowski v. Pfister, 380 U.S. 479 (1965) (civil rights workers repeatedly prosecuted under state law broadly regulating speech). 6/ See also Steffel v. Thompson, 415 U.S. 452 (1974) (granting declaratory relief to handbill distributors repeatedly threatened with arrest). In all other cases that have arisen in that period, a person asserting a constitutional challenge to criminal process has been thought to have an adequate non-injunctive remedy; he may raise his constitutional claim as a defense in the state criminal proceedings, once initiated.

6/ In Dombrowski, the plaintiffs had alleged that their prosecutions were brought in bad faith, see 380 U.S. at 482, yet the court did not seem to rely on this allegation as the primary basis for ordering that an injunction be granted. But see Younger v. Harris, 401 U.S. 37, 47-49 (1971) (discussing Dombrowski).

We have recently recognized that while the Younger line of cases constricts federal intervention in state prosecutions, it does not necessarily control a petition for a federal civil injunction to restrain an ongoing federal criminal proceeding. See Juluke v. Hodel, 811 F.2d 1553, 1556-57 (D.C. Cir. 1987). Nevertheless, in no case that we have been able to discover has a federal court enjoined a federal prosecutor's investigation or presentment of an indictment. Of course, a federal prosecutor typically brings cases only in federal court, 7/ thereby affording

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7/ In the District of Columbia, the United States Attorney may also prosecute criminal charges in the District of Columbia court system. See D.C. Code Ann. § 23-101(c) (1981).

defendants, after indictment, a federal forum in which to assert their defenses -- including those based on the Constitution. Because these defendants are already guaranteed access to a federal court, it is not surprising that subjects of federal investigation have never gained injunctive relief against federal prosecutors.

8/ Moreover, as the district court noted, Rule 12(b)(1) of the Federal Rules of Criminal Procedure permits any defendant to raise by motion, after indictment but before trial, a defense based on "defects

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8/ Juluke assumed (but did not actually hold) that federal courts may extend Doran and Wooley to justify enjoining future federal arrests and prosecutions that chill the exercise of First Amendment rights. See 811 F.2d at 1557. Deaver is neither asserting a violation of First Amendment rights nor complaining that Seymour's threatened indictment chills future behavior.

in the institution of the prosecution." 9/ Deaver's challenge is essentially that -- a contention that there would be a constitutional defect in the institution of any prosecution growing out of the independent counsel's investigation.By implication, the existence of Rule 12(b)(1) suggests that appellant's constitutional challenge is not to be raised in a pre-indictment civil injunctive action. This implication is strengthened by the traditional

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9/ The Federal Rules of Criminal Procedure are a comprehensive set of rules of pleading, practice, and procedure for federal criminal prosecutions. The Supreme Court has been given authority by statute to prescribe such rules and present them to the Congress for examination. The proposed rules take effect 90 days later, unless Congress, by legislation, delays their implementation and/or amends them. Once put into effect, the Federal Rules have the force of the law. See 18 U.S.C. § 3771 (1982). See also Hungate, Changes in the Federal Rules of Criminal Procedure, 61 A.B.A.J. 1203 (1975).

reluctance, which we have discussed, of an equity court to interfere with criminal proceedings. And we think the limited appealability of district court orders denying pretrial motions in criminal cases makes the implication that Deaver cannot bring this Rule 12(b)(1)-type claim to our court inescapable. A district court's denial of a pretrial motion is ordinarily not considered a "final decision" appealable under 28 U.S.C. § 1291; the defendant must therefore stand trial; and only after conviction may he bring the issue to the Court of Appeals. See United States v. Hollywood Motor Car Co., Inc., 458 U.S. 263, 264 (1982); United States v. Bird, 709 F.2d 388, 390 (5th Cir. 1983). The Supreme Court has departed from this application of the "final judgment rule" in criminal cases on only three occasions; in each case it found the district court's decision effectively final under the

collateral order doctrine. See Cohen v. Beneficial Ind. Loan Corp., 337 U.S. 541, 545-47 (1949). The Court has permitted interlocutory appeal of the denial of motions to reduce excessive bail, Stack v. Boyle, 342 U.S. 1 (1951), to dismiss an indictment on double jeopardy grounds, Abney v. United States, 431 U.S. 651 (1977), and to dismiss a prosecution against a congressman prohibited by the Speech and Debate Clause of the Constitution, Helstoski v.Meanor, 442 U.S. 500 (1979). 10/ In each case, immediate appeal was necessary because the

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10/ Applying the rationale of Helstoski, three circuit courts have permitted sitting federal officals who claim immunity from prosecution on separation of powers grounds to bring interlocutory appeals from the denial of their motions to dismiss. See United States v. Myers, 635 F.2d 932 (2d Cir. 1980) (Member of Congress); United States v. Hastings 681 F.2d 706 (11th Cir. 1982) (federal judge); United States v. Claiborne, 727 F.2d 842 (9th Cir. 1984) (federal judge).

petitioner had alleged the violation of a specific right guaranteed by the Constitution "the legal and practical value of which would be destroyed if it were not vindicated before trial." Hollywood Motor Car, 458 U.S. at 266 (quoting United States v. MacDonald, 435 U.S. 850, 860 (1978)).

Deaver argues that the independent counsel's investigation violates important rights and that this violation cannot adequately be remedied at a later date. He contends that he is being forced to defend himself against criminal charges brought by a mere private citizen -- a vigilante. It is true that the burden of being haled into court by a pretender to the throne, so to speak, cannot be completely remedied once a trial begins, for the defendant would still have suffered the indignity. Yet, without deciding an issue not squarely before us,

we doubt that Deaver's claim -- were it unsuccessfully raised in a Rule 12(b)(1) motion after indictment -- would be immediately appealable under the collateral order exception to the final judgment rule. Unlike the defendants in the cases described above, Deaver does not assert a constitutional right not to stand trial, but merely claims that Seymour is not qualified to direct the prosecution. Assuming arguendo Deaver's contention is correct, his rights can be vindicated by a reversal of any conviction. See, e.g., Hollywood Motor Car, 458 U.S. at 268 (defendant's prosecutorial vindictiveness claim can be remedied through post-conviction appeal); United States v. MacDonald, 435 U.S. 850, 860 (1978) (objection to trial based on speedy trial grounds appealable only after conviction); United States v. Taylor, 798 F.2d 1337, 1340 (10th Cir. 1986) (claims of

prosecutorial misconduct, including improper use of state officers in grand jury investigation, appealable after conviction); Bird, 709 F.2d at 392 (claim that prosecution violated plea bargain agreement not to prosecute can be vindicated on post-conviction appeal). Thus, were Deaver to bring this same claim as a Rule 12(b)(1) motion, we think it likely the final judgment rule would bar any appeal of a denial of that motion until after conviction. Were we to allow Deaver to bring a civil challenge, with its attendant rights of appeal, before a prosecution even begins, we would thereby undermine the final judgment rule.

That Deaver's challenge is a serious one with far-ranging and troubling constitutional implications, moreover, does not support hs argument for accelerated and unorthodox judicial review. Indeed, it undermines it. We

have an obligation to avoid constitutional questions if at all possible. Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). This principle is particularly strong when the constitutionality of a federal statute is challenged. Hastings v. Judicial Conference of the United States, 770 F.2d 1093, 1100 (D.C. Cir. 1985), cert. denied, 106 S.Ct. 3272 (1986). If appellant is acquitted of the charges brought against him, we of course would not be obliged to decided this constitutional issue. 11/

11/ The district court's certification of the constitutional question as a controlling question of law under 28 U.S.C. § 1292(b) (1982) does not affect our disposition. To be sure, that issue may well be controlling in the criminal proceeding that would follow Deaver's indictment, but, of course, section 1292(b), by its terms, does not apply to criminal proceedings. And, as we have explained, the issue cannot be controlling in this suit since appellant may not raise the issue in the manner he did.

Congress has established a comprehensive set of rules governing federal criminal prosecutions -- the Federal Rules of Criminal Procedure. These rules provide adequate, although limited, opportunities for defendants to challenge shortcomings in prosecutorial authority. The final judgment rule, moreover, 28 U.S.C. § 1291, generally prevents defendants from bringing appeals until after conviction. We cannot allow Deaver to avoid these rules -- and thereby encourage a flood of disruptive civil litigation -- by bringing his constitutional defense in an independent civil suit. Prospective defendants cannot, by bringing ancillary equitable proceedings, circumvent federal criminal procedure.

Michael K. Deaver v. Whitney North Seymour, Jr. No. 87-5056

Judge D.H. Ginsburg, concurring:

It is a "basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." Younger v. Harris, 401 U.S. 37, 43-44 (1971), quoted approvingly in Juluke v. Hodel, 811 F.2d 1553, 1557 (D.C. Cir. 1987). 1/ The

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1/ In Juluke, this court indicated that the federalism concerns underlying Younger in the context of a federal court asked to enjoin a state prosecution did not operate "in a situation involving civil and criminal proceedings in separate federal court actions." 811 F.2d at 1566 (emphasis in original). At the same time, however, we reaffirmed the broad equitable principle announced in Younger and quoted in the text. Accordingly, after quoting this passage from Younger, the court in Juluke stated:
(cont'd.)

district court applied this rule in

> To the extent that [this equitable doctrine] suggests that the District Court judge in the civil case had discretion to defer action in the proceeding before him pending resolution of the criminal case, the principle is unexceptional. . . .
>
> The only conceivable reason not to consider the claim for injunctive relief in the civil case was that it would have been inefficient to do so, because the same issues -- the validity and applicability of the regulations -- would be decided in the criminal action. That, however, merely restates the traditional test for denying the consideration of equitable relief -- that there is an adequate remedy available at law. We find this reason persuasive as to whether one court may enjoin an ongoing prosecution in another court.

Id. at 1557. The court then proceeded to determine whether the district court had abused its discretion in denying injunctive relief as against arrests for future conduct ("They never sought to enjoin the existing prosecutions." Id.), and relied upon the Younger line of cases for guidance as to when it is appropriate to grant equitable relief. I apply the Younger cases in order to determine whether injunctive relief against a single prosecution is appropriate, applying the same equitable principles as did the court in Juluke.

denying Michael Deaver's request for a preliminary injunction preventing independent counsel Whitney North Seymour, Jr. from seeking an indictment from the grand jury. On appeal we must decide whether the district court abused its discretion in so holding. See Doran v. Salem Inn, Inc., 422 U.S. 922, 931-32 (1975); Juluke v. Hodel, 811 F.2d at 1558.

As the court has explained, see slip op. at 1, 3, Deaver challanges the constitutionality of the independent counsel provisions of the Ethics in Government Act, 28 U.S.C. §§ 49, 591-98 (1982 & Supp.III 1985), and he claims that, if indicted, he would suffer the "continuing destruction of his business," "injury to his reputation and dignity," and "the expenditure of substantial resources in his defense." It is clear that that this type of harm does not rise to the level of "irreparable injury":

> Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered "irreparable" in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution.

Younger v. Harris, 401 U.S. at 46 (citation omitted). It is of no moment that Deaver bases his challenge upon the alleged unconstitutionality of the office of independent counsel; injunctive relief is not granted

> even if [the complained-of] statutes are unconstitutional. "No citizen or member of the community is immune from prosecution, in good faith, for his alleged criminal acts. The imminence of such a prosecution even though alleged to be unauthorized and hence unlawful is not alone ground for relief in equity which exerts its extraordinary powers only to prevent irreparable injury to the plaintiff who seeks its aid."

Waston v. Buck, 313 U.S. 387, 400 (1941),

quoting Beal v. Missouri Pacific Railroad Corp., 312 U.S. 45, 49 (1941). See Younger v. Harris, 401 U.S. at 49. The district court therefore did not abuse its discretion in denying injunctive relief here, because "the injury that [Deaver] faces is solely 'that incidental to every criminal proceeding brought lawfully and in good faith.'" 2/ Younger v. Harris,

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2/ Deaver claims that indictment will result in the "continuing destruction of his business," but this harm does not compare to that relied upon in Doran v. Salem Inn. In that case, the Court, on a "close" call, upheld the grant of injunctive relief to bars which were threatened with prosecution for employing topless dancers. It was undisputed that "absent preliminary relief, they would suffer a substantial loss of business and perhaps even bankruptcy" if forced to comply with the law. 422 U.S. at 932. Here, unlike in Doran, business interests would suffer only indirectly from indictment, as a result of the harm to Deaver's reputation. Such harm is not only more conjectural than that in Doran, but is also intimately linked with the "discomfiture" of prosecution that must be borne "even by an innocent person." Cobbledick v. United States, 309 U.S. 323, 325 (1940).

401 U.S. at 49, quoting Douglas v. City of Jeannette, 319 U.S. 157, 164 (1943). 3/

3/ Deaver contends that, due to the alleged constitutional infirmities in the office of independent counsel, any indictment here would not be "brought lawfully." A further reading of Douglas indicates that this phrase was meant to distinguish the situation in Hague v. C.I.O., 307 U.S. 496 (1939), in which a union sought injunctive relief barring the New Jersey police from continuing their practice of repeatedly removing from Jersey City union members engaged in leafletting and "compell[ing] them to board ferry boats destined for New York." Id. at 501. In light of these facts, the Court stated that the "exclusion, removal, personal restraint and interference, by force and violence, are accomplished without authority of law and without bringing the persons taken into custody before a judicial officer for hearing." Id. at 505. It was in this sense that the criminal proceedings in Hague were not "brought lawfully."

In Deaver's case, conversely, he has available to him the legal remedies provided in the criminal process -- certainly post-indictment, as the court indicates, and perhaps even pre-indictment if the narrow circumstances contemplated in United States v. Ryan, 402 U.S. 530, 532 (1971) arise ("If . . . [a] subpoena is unduly burdensome or otherwise unlawful, [the petitioner] may refuse to comply and litigate those questions in the (cont'd.)

Because I read the court's decision to rest ultimately upon the same basis, see slip op. at 6, I concur.

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event that contempt or similar proceedings are brought against him."). In these circumstances, where the petitioner has not shown irreparable harm, a court of equity may not grant civil injunctive relief and thereby supplant the criminal process. See Juluke v. Hodel, 811 F.2d at 1557-58, and cases cited in n.20.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal
	)	No. 87-096
	)	
MICHAEL K. DEAVER	)	FILED
	)	May 13, 1987

ORDER

Upon consideration of defendant's motion to dismiss on separation-of-powers grounds, independent counsel's response thereto. [1] The opinion of the Division of the U.S. Court of Appeals for the District of Columbia Circuit for the Purpose of Appointing Independent Counsels in In re Theodore Olson, Div. No. 86-1, slip op. (D.C. Cir., Apr. 2 1987), and defendant's reply, while the Court remains not

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[1] Memorandum in Response to Defendant's Motions to Dismiss on Separation-of-Powers, Jurisdictional and Materiality Grounds, filed May 4, 1987, pp. 1-14.

altogether convinced of the constitutionality of the independent counsel provisions of the Ethics in Government Act of 1978, nevertheless, for the reasons summarily set forth in its Memorandum and Order of March 11, 1987, in Deaver v. Seymour, Civ. No. 87-0477, slip op. 5, n.3, and in In re Theodore Olson, supra, by which the Court assumes without deciding it may be bound, it is, this 13th day of May, 1987,

ORDERED, that the motion to dismiss the indictment on the grounds that the independent counsel provisions of the Ethics in Government Act of 1978 are unconstitutional, on their face and as applied herein, is denied without prejudice.

/s/

Thomas Penfield Jackson
U.S. District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal
	)	No. 87-096
	)	
MICHAEL K. DEAVER	)	FILED
	)	May 21, 1987

ORDER

Upon consideration of defendant's motion for reconsideration of this Court's Order of May 13, 1987, denying defendant's motion to dismiss on separation-of powers grounds, and independent counsel's response of May 4, 1987, to defendant's motion to dismiss, it is, for the reasons previously set forth in this Court's Order of May 13, 1987, this 21st day of May, 1987,

ORDERED, that defendant's motion for reconsideration is denied.

/s/

Thomas Penfield Jackson
U.S. District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MICHAEL K. DEAVER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 87-0477
	)	
WHITNEY NORTH SEYMOUR, JR.	)	FILED
	)	Mar. 11, 1987
Defendant.	)	

MEMORANDUM AND ORDER

Plaintiff Michael K. Deaver, a former Presidential assistant and deputy chief of the White House staff, sues for declaratory and injunctive relief against defendant Whitney North Seymour, Jr., an Independent Counsel appointed under the Ethics in Government Act of 1978 (the "Act"), 28 U.S.C. §§ 49, 591-98, who expects shortly to cause Deaver to be indicted for perjury. Deaver contends that the Act, from which Seymour derives such power as he may have to investigate, indict, and prosecute him, is unconsti-

tutional in several respects in which it allegedly violates the principle of the separation of governmental powers, and prays that the Court declare the Act invalid, permanently enjoin all further activity of the Independent Counsel directed towards him, and, in effect, impound the evidence Seymour has gathered to date.

The Court temporarily restrained Seymour's return of an indictment on February 25, 1987, and the matter is now before the Court on Deaver's motion for a preliminary injunction to the same effect pending disposition on the merits. [1/] For

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[1/] Plaintiff has since moved to consolidate the hearing on his motion for preliminary injunction with a hearing on the merits on his simultaneously-filed motion for summary judgment. Defendant has, in his turn, moved to dismiss the complaint.

Since, however, it is only the imminent return of an indictment which necessitates an exigent disposition, and time being of (cont'd.)

the reasons set forth below, the Court will deny the motion for a preliminary injunction and stay further proceedings herein.

For present purposes the material facts appear of record and are not in dispute. On May 29, 1986, at the instance of the Deputy Attorney General, Seymour, a private New York lawyer holding no other present office under the United States, was appointed Independent Counsel by an order of a special division of the United States Court of Appeals for the District of Columbia Circuit (itself a creature of the Act, 28 U.S.C. § 49), to "investigate and pursue" certain specific allegations of criminal misconduct by Deaver in his post-governmental-service lobbying

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paramount importance to the parties and the public, the motion to consolidate is denied. The Court observes, moreover, that the dispositive cross-motions raise disputed issues of fact which go beyond the allegations of the complaint.

activities, and to prosecute him for any violations he found. On December 16, 1986, upon Seymour's own petition, his authority was expanded to include the investigation and prosecution of possible instances of conspiracy, obstruction of justice, and perjury by Deaver and others in connection with the investigation, and a separate allegation of perjury by Deaver in testimony before a House of Representatives Subcommittee.

On February 25, 1987, hours before Seymour was to ask the federal grand jury hearing his evidence to return a four-count indictment against Deaver for perjury, Deaver filed the instant action and secured the temporary restraining order.

Deaver claims that the formal commencement of his prosecution by Seymour would cause him immediate injury which neither his exoneration after trial nor a

subsequent ruling that Seymour was without authority to bring him to trial at all would repair. Seymour now responds that Deaver has a remedy which, if not optimum (affording no opportunity for an immediate appeal), is nevertheless legally adequate: once indicted, he may move to dismiss the charges prior to trial pursuant to Fed. R. Crim. P. 12 (b)(1) for "defects in the institution of the prosecution." The Court agrees.

There are, moreover, other elements of a meritorious application for a preliminary injunction (as to which the moving party has the burden) which the Court finds that Deaver has failed to establish, [2/] the most important being a

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[2/] See Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958); Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

likelihood of ultimate success on the merits. The Court has had the benefit of substantial scholarship from not only the parties but several amici curiae. Despite the confidence with which they have advanced case law and constitutional reasoning in support of their respective positions, this Court remains unconvinced that any result is clearly foreordained by the authorities so far cited to it. The prospect of a citizen-prosecutor, who is: (1) chartered by an Article III court of special jurisdiction proceeding ex parte in closed session; (2) armed with all the powers of the Attorney General of the United States but only minimally accountable - and that to Congress and the special court - for their use; and (3) removable only for provable improprieties or personal debility, is a constitutional hybrid which neither the framers of the Constitution nor any court since expressly

contemplated. Nevertheless, such scant truly relevant authority as there is on the subject suggests to this Court that the arrangement, on its face, will probably not be found to offend the Constitution, [3] and there are no specific instances of the statute's misapplication

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[3] The Court concludes that the constitutionality of the Act will likely be upheld on the following grounds: that independent counsel are "inferior Officers" of the United States whose interbranch appointment is not "incongruous" and is, therefore, permitted by Art. II, § 2, cl. 2 of the Constitution, see Ex parte Siebold, 100 U.S. 371 (1880); that the Act does not infringe on the Executive's duty to "take Care" that the laws are faithfully executed, because only the Attorney General may initiate the appointment of independent counsel, see 28 U.S.C. § 592(f); Banzhaf v. Smith, 737 F.2d 1167 (D.C. Cir. 1984) (en banc); and that the Act does not unconstitutionally restrict the Executive's power of removal, because Congress may provide that certain officials operate with "freedom from Executive interference," Wiener v. United States, 357 U.S. 349, 353 (1958); Humphrey's Executor v. United States, 295 U.S. 602 (1935).

to him alleged by Deaver that are presently ripe for adjudication.

Moreover, the public interest - another factor to be considered in passing upon an application for preliminary injunctive relief - requires that questions as to the validity of Independent Counsel provisions of the Act be quickly and definitively resolved, as well as that any possible violations of the criminal law be speedily prosecuted. The former is most likely to be accomplished on an appeal from this ruling, and the latter by allowing Independent Counsel Seymour to bring forth his indictment.

For the foregoing reasons, therefore, it is this 11th day of March, 1987,

ORDERED, that plaintiff's motion for a preliminary injunction is denied; and it

FURTHER ORDERED, sua sponte, that all further proceedings herein are stayed pending completion of appellate review of this Order. [4]

/s/

Thomas Penfield Jackson
U.S. District Judge

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[4] To the extent it may be necessary to the jurisdiction of the Court of Appeals to reach any question presented by this case not otherwise appealable under 28 U.S.C. § 1292(a)(1), this Court states, pursuant to id., § 1292(b), that it is of the opinion that the constitutionality vel non of the Independent Counsel provisions of the Ethics in Government Act is a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal herefrom may materially advance the ultimate termination of this litigation.

No. 86-2026

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

MICHAEL K. DEAVER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE UNITED STATES IN OPPOSITION

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BRIEF OF THE UNITED STATES IN OPPOSITION

STATEMENT OF THE CASE

Indictment Crim. No. 87-0096 was filed on March 18, 1987. On March 26, 1987, the District Court scheduled the trial of this indictment to commence on June 8, 1987.

Petitioner filed a motion to dismiss the indictment on April 20, 1987. This motion was denied on May 13, 1987, and an application for reconsideration was denied on May 21, 1987. Petitioner appealed the denial of the motions to the Court of Appeals on May 26, 1987. The Government immediately moved to dismiss the appeal on the ground that the order denying the pre-trial motion was a non-final, non-appealable order. The originally scheduled trial date of June 8, 1987 passed without a ruling on this motion, so the District Court postponed the trial until such time as the motion or appeal was decided. On June 15, 1987, the Court of Appeals granted the Government's motion to dismiss the appeal, and directed that its mandate issue forthwith. (Pet. App. A).

Upon the return of the case to the District Court, the trial date was firmly set for July 13, 1987. This was done over

petitioner's application for further delay of the trial. On June 22, 1987, petitioner filed a petition for a writ of certiorari to have the Supreme Court review the Court of Appeals order of June 15, 1987, dismissing the appeal. On June 24, 1987, petitioner moved the Court of Appeals for recall of its mandate and a stay of proceedings in the District Court until Supreme Court disposition of the petition for a writ of certiorari. This motion was denied on June 30, 1987. Petitioner then sought a stay from Chief Justice Rehnquist, which was also denied.

On July 13, 1987, trial commenced with jury selection in the District Court. Jury selection was, however, terminated by the District Court on July 16, 1987, in light of the July 15, 1987 opinion of the Court of Appeals upholding a challenge by representatives of the news media to the jury selection procedures employed by the

District Court. Cable News Network, Inc. et al. v. United States et al., No. 87-5245 (D.C. Cir. July 15, 1987).

Trial has been rescheduled to commence on October 19, 1987.

REASONS FOR DENYING THE WRIT

1. As the foregoing statement of facts indicates, the petition seeks review of a plainly correct ruling of the Court of Appeals that the District Court's order denying a motion to dismiss an indictment is not a final order, and therefore not appealable. Cohen v. Beneficial Ind. Loan Corp., 337 U.S. 541 (1949).

2. This Court has long recognized that interlocutory appeals in criminal cases are contrary to the statutory limit on the jurisdiction of the courts of appeals to "final decisions of the district courts," 28 U.S.C. §1291, and inimical to the sound administration of the criminal law. United States v. Hollywood Motor Car

Co., 458 U.S. 263, 265 (1982); United States v. McDonald, 435 U.S. 850 (1978).

3. The procedural posture of this case also makes review by this Court at the present time inappropriate. Trial is scheduled to commence in the District Court on October 19, 1987. If the trial ends in acquittal, the petition will be rendered moot. In event of conviction, and affirmance of that conviction by the Court of Appeals, only then would review by this Court of the issues contained in the petition be appropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 21, 1987